U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 22 2010

LIN-07-209-50277

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry concerning your case must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an architecture and engineering firm. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish its employer status in this case and further failed to establish ability to pay the proffered wage as of the priority date and to the present.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> ***Ability of prospective employer to pay wage.*** Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Here, the ETA Form 9089 was filed by the petitioner, [redacted] (FEIN: and accepted by the DOL on April 2, 2007. The proffered wage as stated on the ETA Form 9089 is $49,317 per year. On the petition, the petitioner claims that it has been established in 1906, to have a gross annual income of $10,800,000, and to currently employ 59 workers.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner claims on the ETA Form 9089 that the beneficiary has been working in the proffered position since October 18, 2005. However, the petitioner submitted a Form W-2 issued by [redacted] to the beneficiary for 2006 and the beneficiary's 10 paystubs showing that [redacted] paid the beneficiary $1846.42 bi-weekly in 2007 and the year-to-date earnings were $18,464.18 as of May 24, 2007. On appeal, counsel submits the beneficiary's 2007 W-2 form shows that the AESS paid the beneficiary $53,467 in 2007 which was greater than the proffered wage in this case. The record does not contain any other document to evidence that the petitioner paid the beneficiary any compensation from 2007 onward. Nor does the record contain any evidence showing that the beneficiary is paid the proffered wage in 2008 onward.

On appeal, counsel asserts that both the petitioner, [redacted] are wholly owned subsidiaries of [redacted] (later changed name to Planning Architecture Engineering [redacted] and that the petitioner and AESS are consolidated to the tax return of PAEA. Thus, the petitioner and AESS are the same entity. Therefore, the petitioner established its ability to pay the proffered wage as of the priority date in 2007 through the examination of wages actually paid to the beneficiary by AESS.

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a single consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. This office accessed

California's official website which reflects that the petitioner, AESS and PAEA are formed and registered as separate Californian corporations and all of them are active.[2] The record of the proceedings contains documentary evidence showing that the PAEA holds the ownership of the petitioning entity and AESS. Counsel claims that the petitioner and AESS do not file their separate returns but they are all consolidated on the return of PAEA. However, in this case, the priority date falls on April 2, 2007 and therefore, the petitioner's employer status, and ability to pay the proffered wage beginning in 2007. The record does not contain consolidated tax returns, annual reports or audited financial statements for the controlled group for the year of priority date onwards. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to demonstrate that the petitioner and AESS are the corporate members of the same controlled group and, therefore failed to establish the petitioner's ability to pay the proffered wage through the examination of wages actually paid by AESS in 2007. The petitioner also failed to demonstrate that the beneficiary was paid the full proffered wage in 2008 and thereafter by itself or by other corporate member of the same controlled group.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

[2] *See* State of California official business database at http://kepler.sos.ca.gov/cbs.aspx (accessed on April 9, 2010).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains Form 1120S U.S. Income Tax Return for an S Corporation Income Tax Return, filed by [redacted]. for 2005 and Form 1120S filed by [redacted] formerly known as [redacted] for 2006. As discussed previously, the priority date in the instant case is April 2, 2007, and therefore, the tax returns for 2005 and 2006 are not necessarily dispositive. Furthermore, without documentary evidence to establish that the petitioner is the same entity as PAEA or the corporate member of PAEA, the AAO cannot consider the 2005 and 2006 tax returns for PAEA or its predecessor enterprise as primary evidence in determining the petitioner's ability to pay the proffered wage in 2007 onwards. The record does not contain any annual reports, or audited financial statements for the petitioner or for any controlled group or its corporate members for 2007 and thereafter to demonstrate that the petitioner, the same entity as the petitioner, or its controlled group has sufficient net income or net current assets to pay the proffered wage as of the priority date and to the present.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions. In the instant case, counsel asserts that the petitioner does not file its own tax return because it is a corporate member of the controlled group, PAEA. Therefore, PAEA must demonstrate that it has sufficient net income or net current assets to pay all the proffered wages not only to the instant beneficiary but also to the beneficiaries of the pending or approved petitions filed by the petitioner, by all other corporate members of the controlled group and by the controlled group itself. USCIS records show that the petitioner filed six I-140 immigrant petitions (including the instant petition) and 12 I-129 nonimmigrant petitions; that [redacted]. (another alleged corporate member of the controlled group under PAEA) filed one I-140 immigrant petition and three nonimmigrant petitions; and that AESS field one immigrant petition. Seven of the eight immigrant petitions were approved[4] by USCIS for which the petitioner or the alleged controlled group is

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[4] USCIS records show that the seven approved immigrant petitions are as follows:

obligated to pay six proffered wages in 2007 and 2008, three proffered wages in 2009 as well as H-1B employees in addition to the instant beneficiary. The record does not contain any evidence showing that the petitioner or petitioning corporate member paid the full proffered wages to the beneficiaries of these approved petitions in these three relevant years. The petitioner did not submit any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements, for these three years to establish ability to pay the proffered wages. Without demonstrating that these beneficiaries of the approved petitions were paid full proffered wages or the ability to pay the proffered wages was established with regulatory-prescribed evidence, the instant petition cannot be approved.

The petitioner failed to submit evidence to demonstrate that it is eligible to use other entities' payment, income or assets to establish the ability to pay the proffered wage during the year of the priority date and subsequent years. It also failed to submit regulatory-prescribed evidence to demonstrate sufficient funds to establish ability to pay the proffered wages beginning on the priority date to the present. **Therefore, the petition cannot be approved. Accordingly, the director's** February 21, 2008 decision is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has a valid labor certification to support the instant petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The

---

-- SRC-07-014-51793 filed on October 18, 2006 with the priority date of April 1, 2003, and approved on December 13, 2006. The beneficiary was adjusted to lawful permanent resident status on March 14, 2008.
-- LIN-07-027-52965 filed on November 6, 2006 with the priority date of October 10, 2006, and approved on June 19, 2007. The beneficiary's adjustment of status application is still pending as of February 18, 2009.
-- SRC-07-162-50995 filed on May 1, 2007 with the priority date of January 15, 2007, and approved on July 23, 2007.
-- SRC-07-217-52485 filed on June 14, 2007 with the priority date of March 5, 2007, and approved on January 15, 2008.
-- LIN-07-199-52699 filed on July 2, 2007 with the priority date of March 21, 2005, and approved on December 23, 2008. The beneficiary was adjusted to lawful permanent resident status on June 18, 2009.
-- SRC-07-800-23143 filed on July 26, 2007 with the priority date of June 5, 2007, and approved on April 25, 2008.
-- LIN-09-191-51847 filed on July 8, 2009 with the priority date of July 30, 2008, and approved on September 17, 2009.

regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on June 19, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in Accounting is the minimum level of education required. Line 6 reflects that no alternate field of study is acceptable. Line 8 reflects that an alternate combination of education and experience is acceptable and Line 8-B indicates the acceptable alternate level of education as follows: Bachelor's Degree plus five years of experience or any reasonable combination of education, training and experience. Line

14 further details this alternate combination as following specific skills or other requirements: "Requires a Master's Degree in Accounting and 1 year of experience, or a Bachelor's Degree in Accounting and 5 years of progressive experience or reasonable combination of education, training and experience thereof."

The plain meaning of the language on the ETA Form9089 clearly indicates that the requirements of the proffered position may be met with a reasonable combination of education, training and experience in the job offered, and thus, the job offer portion of the ETA Form 9089 does not require a master's degree in accounting as minimum requirements for the proffered position. Therefore, the petition cannot be approved for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file another petition for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the petition cannot be approved for the classification sought.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.